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2  
3 IN THE UNITED STATES DISTRICT COURT  
4

5 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
6

7 V.L., et al.,  
8

Plaintiffs,  
9

v.  
10

No. C 09-04668 CW  
11

ORDER GRANTING  
PLAINTIFFS' MOTION  
FOR A PRELIMINARY  
INJUNCTION  
12

13 JOHN A. WAGNER, Director of the  
California Department of Social  
Services; DAVID MAXWELL-JOLLY,  
Director of the California Department  
of Health Care Services; CALIFORNIA  
DEPARTMENT OF HEALTH CARE SERVICES;  
CALIFORNIA DEPARTMENT OF SOCIAL  
SERVICES,  
14

Defendants.  
15 \_\_\_\_\_ /  
16

17 Plaintiffs are disabled and elderly Californians who need in-  
home assistance with one or more of the activities of daily living,  
such as eating, bathing, toileting or taking medication, in order  
18 to live safely at home without risk of serious injury or harm.  
19

20 Plaintiffs seek to prevent the State from applying a change in the  
law to reduce or terminate these services to over 130,000 people  
21 who receive them from the state In-Home Supportive Services (IHSS)  
22 program, by changing the eligibility criteria of the program in a  
23 way that, the Court concludes, likely violates federal law. This  
24 change would reduce or terminate services to recipients based on  
25 numerical rankings and a complicated mathematical formula devised  
26 years ago, which was not designed, and has never been used, to  
27  
28

1 measure an individual's need for care.

2 Plaintiffs provide ample evidence that they and others like  
3 them will be irreparably harmed if they lose their in-home help.  
4 They will be unable to care for themselves, suffer injuries, and be  
5 relegated to emergency rooms, hospitals, and other institutions.  
6 Although the State counters that its budget crisis requires such  
7 cuts, and the Court weighs this in the balance, the increase in  
8 more expensive hospitalization and institutionalization of needy  
9 disabled and elderly people will likely outweigh the short-term  
10 savings. And in any event, the human suffering that will be caused  
11 by the change in the law justifies the Court's preliminary  
12 injunction against the implementation of this change.

## BACKGROUND

Under the 1965 federal Medicaid Act, the federal government financially assists participating states that provide medical services to eligible beneficiaries. California participates in Medicaid through the Medi-Cal Program. In 1973, California established In-Home Supportive Services (IHSS) as part of its Medi-Cal program to provide assistance with the tasks of daily living to low-income elderly and disabled persons. IHSS is funded with a combination of state, county and federal Medicaid monies. *Id.* § 12306. Over 360,000 IHSS caregivers serve over 440,000 individuals in California. Sixty percent of IHSS recipients are senior citizens.

Those who qualify for IHSS are persons "who are unable to perform the services themselves and who cannot safely remain in their homes or abodes of their own choosing unless these services are provided." Welf. & Inst. Code § 12300(a). The California

1 Department of Social Services (CDSS) Manual of Policies and  
2 Procedures (MPP) similarly directs that IHSS "provides assistance  
3 to those eligible aged, blind and disabled individuals who are  
4 unable to remain safely in their own homes without this  
5 assistance." MPP § 30-700.1.<sup>1</sup> The MPP also states that a  
6 particular service will not be authorized unless the social worker  
7 evaluating the individual "has determined that the recipient would  
8 not be able to remain safely in his/her own home without IHSS" and  
9 "performance of the service by the recipient would constitute such  
10 a threat to his/her health/safety that he/she would be unable to  
11 remain in his/her own home." Id. § 30-761.13-14.

12 In 1988, fifteen years after the IHSS program was created, the  
13 State legislature passed a law requiring the CDSS to develop a  
14 uniform needs assessment tool "to assure that in-home supportive  
15 services are delivered in all counties in a uniform manner." Cal.  
16 Welf. & Inst. Code § 12309(a).

17 The CDSS developed and implemented such a tool, calling it the  
18 Uniformity Assessment System. The System defined ranks of one to  
19 five for social workers to use in use in rating elderly or disabled  
20 individuals' functional abilities in each of fourteen areas:<sup>2</sup>  
21 housework; laundry; shopping and errands; meal preparation and

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22       <sup>1</sup>The Court takes judicial notice of Plaintiffs' Exhibits A  
23 through I to their request and the State Defendants' Exhibits A and  
24 B to their request. These documents consist of publications by  
25 state officials and agencies which contain facts that are not  
26 subject to reasonable dispute in that they are capable of accurate  
27 and ready determination by resort to sources whose accuracy cannot  
28 be reasonably questioned.

29       <sup>2</sup>It is not clear why, but these areas do not include many  
30 other tasks for which IHSS hours may be authorized, such as helping  
31 with self-administration of medications or transportation to  
32 doctors' appointments.

1 clean up; mobility inside the residence; bathing and grooming;  
2 dressing; bowel, bladder and menstrual; transfer from one position  
3 to another; eating; respiration; memory; orientation; and judgment.

4 The ranks are defined as follows:

5 Rank one. A recipient's functioning shall be classified as  
6 rank one if his or her functioning is independent, and he or  
7 she is able to perform the function without human assistance,  
8 although the recipient may have difficulty in performing the  
function, but the completion of the function, with or without  
a device or mobility aid, poses no substantial risk to his or  
her safety.

9 Rank two. A recipient's functioning shall be classified as  
10 rank two if he or she is able to perform a function, but  
needs verbal assistance, such as reminding, guidance, or  
encouragement.

11 Rank three. A recipient's functioning shall be classified as  
12 rank three if he or she can perform the function with some  
13 human assistance, including, but not limited to, direct  
physical assistance from a provider.

14 Rank four. A recipient's functioning shall be classified as  
15 rank four if he or she can perform a function, but only with  
substantial human assistance.

16 Rank five. A recipient's functioning shall be classified as  
17 rank five if he or she cannot perform the function, with or  
without human assistance.

18 Id. § 12309(d) .

19 Social workers annually re-assess each recipient's rank in the  
20 fourteen areas on an individualized basis. MPP § 30-761.1. These  
21 social workers are specifically trained to determine a recipient's  
22 level of functional ability. Since 2005, the State has spent \$10  
23 million providing eight days of training to over 16,000 social  
24 workers who conduct IHSS assessments.

25 However, the ranks have never before been used to determine  
26 IHSS eligibility. Rather, as noted above, social workers were  
27 required to find a person eligible for services if he or she "would  
28 not be able to remain safely in his/her own home without IHSS."

1 Id.; see also Welf. & Inst. Code § 12300(a); MPP § 30-700.1. By  
2 definition, an individual given a rank of two through five in any  
3 of the functions needs some IHSS assistance to remain safely in his  
4 or her own home.

5 Rather, the purpose of the ranks was to help social workers  
6 determine with uniformity the number of hours of a particular  
7 service elderly and disabled individuals needed. In the MPP, time  
8 guidelines are provided for each rank for some tasks.

9 As another part of the Uniformity Assessment System, the State  
10 created the Functional Index (FI) Score in 1988. Each recipient is  
11 given an overall Functional Index Score between 1.00 and 5.00,  
12 which is calculated based on a weighted average of eleven of the  
13 recipient's fourteen ranks of functional ability.<sup>3</sup> The mental  
14 tasks (i.e., memory, orientation and judgment) are not counted in  
15 this calculation. The State calculated the weights by using the  
16 following method: first, the State computed the county-wide average  
17 number of hours per week of IHHS provided for each task for the  
18 people who received help with that task; second, all the county-  
19 wide averages more than one standard deviation away from the mean  
20 were removed from the computation; third, the county-wide averages  
21 from each of the remaining counties were then averaged to get a  
22 state-wide average of hours per week for each task; fourth, the  
23 state-wide average of hours per week for each task were added  
24 together to get a state-wide number representing the average IHSS  
25 hours per week for all of the tasks; fifth, the state-wide average  
26 for each task was divided by the state-wide average for all of the

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27  
28 <sup>3</sup>The parties refer to these numerical ranks of functioning as  
"functional ranks."

1 tasks together. The quotient was the weight used to calculate the  
2 FI Score. In effect, then, tasks that take more time are weighted  
3 more heavily.

4 These weights were calculated in 1988 and have not been  
5 changed since. The weights are as follows:

<u>Function</u>	<u>Weight</u>
Housework	.038
Laundry	.037
Shopping and Errands	.040
Meal Preparation and Clean Up	.222
Mobility Inside	.079
Bathing and Grooming	.095
Dressing	.057
Bowel, Bladder and Menstrual	.129
Transfer	.094
Eating	.127
Respiration	.082

12 An individual's FI Score is calculated using these weights as  
13 follows: A one is subtracted from his or her rank for each  
14 function. Each of those numbers is multiplied by the weight  
15 assigned to the respective functions. (As noted above, the mental  
16 functioning ranks are not counted.) These products are totaled and  
17 a one is added to the sum. The result is the FI Score. In a July  
18 1, 1989 Report to the Legislature on IHSS Uniformity, the CDSS  
19 stated, "Admittedly, the description of the application of the  
20 formula is difficult to conceptualize." Report to Legislature:  
21 IHSS Uniformity at 10.

22 In effect, then, a person who needs help with a greater number  
23 of different tasks, especially tasks usually that take more time  
24 perform, will have a higher score than a person who needs help with  
25 a smaller number of different tasks, irrespective of the severity  
26 of their need for the help. Need for assistance with the mental  
27 functioning tasks of memory, orientation and judgment is not  
28

1 considered in the Score.

2 FI Scores were intended to be used by social workers and  
3 county and state administrators "to compare the FI Scores and FI  
4 Hours of clients on their caseload." All County Letter No. 88-118  
5 at 5. For example, if the hours of IHSS approved by a social  
6 worker "do not seem to correlate to the FI Score, the worker should  
7 be able to identify unique circumstances which account for the  
8 variance." Id. The FI Score was specifically not meant to be used  
9 as a tool to predict the number of hours an individual beneficiary  
10 needed. Id. at 4. More importantly, the FI Score was not created  
11 to be an eligibility criterion to determine whether an individual  
12 beneficiary needed services to live safely in his or her home.

13 In response to California's current budget crisis, the  
14 Legislature passed and on July 28, 2009, the Governor signed ABX4  
15 4, which put numerical ranks and FI Scores to a new use.  
16 Specifically, ABX4 4 amended section 12309 and added section  
17 12309.2 to the California Welfare and Institutions Code, to provide  
18 that IHSS recipients must have a numerical rank of at least four in  
19 a given category of domestic and related services (i.e. housework;  
20 laundry; shopping and errands; and meal preparation and clean up)  
21 to receive any services in that category, and must have an FI Score  
22 of at least 2.0 to receive any IHSS services at all.

23 ABX4 4 exempts individuals authorized to receive either  
24 protective supervision or paramedical services.<sup>4</sup> These  
25

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26 <sup>4</sup>"Paramedical services include the administration of  
27 medications, puncturing the skin or inserting a medical device into  
a body orifice, activities requiring sterile procedures, or other  
activities requiring judgment based on training given by a licensed  
28 (continued...)

1 beneficiaries will continue to receive all of their IHSS services  
2 regardless of their FI Scores and numerical ranks for domestic and  
3 related services. Cal. Welf. & Inst. Code §§ 12309(e) (2) &  
4 12309(a) (3). Defendants claim that if recipients rank at five in  
5 any one of the mental functioning categories they receive  
6 protective supervision services and are exempt from the ABX<sup>4</sup> 4  
7 requirements.<sup>5</sup> However, Plaintiffs dispute this point because  
8 protective supervision is available only if "a need exists for  
9 twenty-four-hours-a-day of supervision in order for the recipient  
10 to remain at home safely," MPP § 30-757.173, and it is not clear  
11 that everyone with a five in one of these categories requires  
12 twenty-four hour care.

13 The new eligibility standards under ABX<sup>4</sup> 4 were to go into  
14 effect on November 1, 2009. CDSS estimates that 97,000 disabled  
15 and elderly individuals would lose domestic and related services  
16 and 36,000 would lose all IHSS services.

17 CDSS planned to deliver Notices of Action to recipients whose  
18 IHSS benefits would be reduced or eliminated by ABX<sup>4</sup> 4. The  
19 notices were not sent because the Court issued a temporary  
20 restraining order. Defendants have submitted to the Court the  
21 notices they intended to send. If a recipient's services would be  
22 terminated altogether because his or her FI Score is less than 2.0,  
23 the notice would state:

24 AS OF 11/01/2009, THE IN-HOME SUPPORTIVE SERVICES (IHSS)  
25 YOU HAVE BEEN GETTING WILL STOP. HERE'S WHY: A CHANGE IN

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26 <sup>4</sup>(...continued)  
27 health care professional." Cal. Welf. & Inst. Code § 12300.1.

28 <sup>5</sup>In the three mental tasks (i.e., memory, orientation and  
judgment), recipients can be given ranks of only one, two or five.

1       THE LAW SET A SPECIFIC NEED LEVEL NECESSARY TO GET IHSS  
2       THAT IS DETERMINED BY FUNCTIONAL INDEX SCORE. THE NEED  
3       FOR IHSS IS DETERMINED UTILIZING A UNIFORM NEEDS  
4       ASSESSMENT TOOL DESIGNED TO EVALUATE FUNCTIONING IN ADLS  
5       (ACTIVITIES OF DAILY LIVING) AND IADLS (INSTRUMENTAL  
6       ACTIVITIES OF DAILY LIVING) MPP 12309(C)(1). THE UNIFORM  
7       ASSESSMENT TOOL EVALUATES FUNCTIONAL ABILITY ON A DEFINED  
8       SCALE MADE UP OF 5 RANKS: 1 -- INDEPENDENT; 2 -- REQUIRES  
9       VERBAL ASSISTANCE; 3 -- REQUIRES SOME HUMAN ASSISTANCE;  
10      4 -- REQUIRES SUBSTANTIAL HUMAN ASSISTANCE AND  
11      5 -- CANNOT PERFORM WITH OR WITHOUT HUMAN ASSISTANCE.  
12      RANKING IS DONE IN 11 AREAS OF PHYSICAL FUNCTIONING.  
13      THEN A FUNCTIONAL INDEX (FI) SCORE IS DETERMINED  
14      UTILIZING A WEIGHTED AVERAGE CALCULATION APPLIED TO THE  
15      RANKINGS IN THESE 11 AREAS. THE FUNCTIONAL INDEX SCORE  
16      PROVIDES A MEASUREMENT OF RELATIVE DEPENDENCE ON HUMAN  
17      ASSISTANCE FOR IHSS TASKS. INDIVIDUALS WITH A FUNCTIONAL  
18      INDEX SCORE BELOW 2.0 ARE NOT ELIGIBLE TO RECEIVE IHSS  
19      (W&IC 12309(F) (2)).

20      Carroll Decl., Exh. C. The notice then lists the recipient's  
21      Functional Index Score as well as his or her ranks in each of the  
22      eleven functions. A cursory and opaque one-page description of how  
23      the State calculates the Score would be enclosed.

24      If some of a recipient's services would be terminated because  
25      his or her rank in those functions is below four, the notice would  
26      state:

27      AS OF 11/01/2009, THE HOURS OF SERVICE FOR DOMESTIC YOU HAVE  
28      BEEN GETTING WILL STOP. HERE'S WHY: A CHANGE IN THE LAW SET A  
29      SPECIFIC NEED LEVEL NECESSARY TO GET DOMESTIC OR RELATED  
30      SERVICES THAT IS DETERMINED BY FUNCTIONAL ABILITY IN THAT  
31      AREA. FUNCTIONAL ABILITY IS MEASURED ON A 5 RANK SCALE: 1 --  
32      INDEPENDENT; 2 -- REQUIRES VERBAL ASSISTANCE; 3 -- REQUIRES  
33      SOME HUMAN ASSISTANCE; 4 -- REQUIRES SUBSTANTIAL HUMAN  
34      ASSISTANCE AND 5 -- CANNOT PERFORM WITH OR WITHOUT HUMAN  
35      ASSISTANCE. INDIVIDUALS WITH A RANK BELOW 4.0 ARE NOT  
36      ELIGIBLE TO GET THE ASSOCIATED DOMESTIC OR RELATED SERVICE  
37      (W&IC 12309(E) (1)). YOUR FUNCTIONAL RANK FOR DOMESTIC IS [1,  
38      2 OR 3]. THEREFORE, YOUR NEED DOES NOT MEET THE REQUIRED  
39      LEVEL TO GET HELP WITH DOMESTIC SERVICES.

40      The notice would then repeat the same paragraph for each  
41      additional service eliminated.

42      At the bottom of the page, both forms of notice state in  
43      Spanish, "If you do not understand the information or notice,

1 contact the social worker in your county. The county should  
2 provide you with an interpretation service free of charge."

3 The back of both forms of notice advises recipients that they  
4 have a right to a "conference with representatives of CDSS to talk  
5 about this intended action." Recipients also have the right to  
6 receive a state hearing if they request it within ninety days of  
7 the mailing date of the notice. If the request is made "before the  
8 effective date of the county's proposed action . . . services may  
9 continue until the hearing." If a recipient looks back to the  
10 first page of the notice, he or she will learn that the date  
11 alluded to is November 1, 2009.

12 On October 5, 2009, Plaintiffs filed this complaint and motion  
13 for a temporary restraining order and/or preliminary injunction.<sup>6</sup>  
14 Plaintiffs claim that amended sections 12309(e) and 12309.2 of the  
15 California Welfare and Institutions Code violate the Medicaid Act,  
16 the Americans with Disabilities Act, Section 504 of the  
17 Rehabilitation Act and the Due Process Clause of the United States  
18 Constitution. The Court granted Plaintiffs' request to expedite  
19 the briefing and set a hearing on the motion for October 19, 2009  
20 based on Plaintiffs' understanding that the notices would be mailed  
21 on October 20. Defendants did not disabuse the Court of this

22 \_\_\_\_\_  
23 <sup>6</sup>Plaintiffs concurrently filed a motion for class  
24 certification. However, Defendants concede that "there is no need  
for the Court to consider class certification at this time."  
Opposition at 31. "District courts are empowered to grant  
25 preliminary injunctions 'regardless of whether the class has been  
certified.'" Brantley v. Maxwell-Jolly, 2009 WL 2941519, at \*14  
n.14 (N.D. Cal.) (citing Schwarzer, Tashima and Wagstaffe, Federal  
Civil Procedure Before Trial, § 10:773 at 10-116 (TRG 2008)).  
Thus, Plaintiffs can obtain class-wide injunctive relief before  
26 moving to certify a class and the Court denies Plaintiffs' motion  
without prejudice to refiling at a later date.  
27  
28

1 understanding.

2 On October 14, Deputy Attorney General Gregory Brown notified  
3 Plaintiffs that it was his "understanding that the Notices of  
4 Action will be going out to recipients on October 15, 2009."  
5 Surprised at State Defendants' decision to move forward with the  
6 Notices of Action earlier than expected despite the pending motion,  
7 Plaintiffs promptly moved for an immediate temporary restraining  
8 order to enjoin State Defendants from issuing Notices of Action to  
9 IHSS recipients regarding the subject matter of this litigation any  
10 time prior to this Court's ruling on the preliminary injunction  
11 motion. The Court granted the temporary restraining order.<sup>7</sup>

## LEGAL STANDARD

13           “A plaintiff seeking a preliminary injunction must establish  
14 that he is likely to succeed on the merits, that he is likely to  
15 suffer irreparable harm in the absence of preliminary relief, that  
16 the balance of equities tips in his favor, and that an injunction  
17 is in the public interest.” Winter v. Natural Res. Def. Council, Inc., \_\_\_\_ U.S. \_\_\_, 129 S. Ct. 365, 374 (2008). “In each case,  
18 courts ‘must balance the competing claims of injury and must  
19 consider the effect on each party of the granting or withholding of  
20 the requested relief.’” Id. at 376 (quoting Amoco Prod. Co. v.  
21 Vill. of Gambell, Alaska, 480 U.S. 531, 542 (1987)).  
22

## DISCUSSION

24 || The Likelihood of Success on the Merits

#### A. Medicaid Act Claims

As mentioned above, Congress established the Medicaid program

<sup>7</sup>The Court has considered and hereby denies Defendants' request for reconsideration of the temporary restraining order.

1 in 1965 to enable states to provide medical services to individuals  
2 with limited abilities to pay for health care. 42 U.S.C. § 1396-  
3 1396v. A state's participation in Medicaid is voluntary, but when  
4 a state chooses to participate, it must comply with the Medicaid  
5 Act and its implementing regulations. 42 U.S.C. § 1396.

6       1. Comparability Requirement

7       The "comparability" requirement of the Medicaid Act mandates  
8 comparable services for individuals with comparable needs and is  
9 violated when some recipients are treated differently than others  
10 where each has the same level of need. 42 U.S.C.  
11 § 1396a(a)(10)(B); see also 42 C.F.R. § 440.240; Jenkins v.  
12 Washington State Dep't of Social & Health Servs., 157 P.3d 388, 392  
13 (Wash. 2007); Sobky v. Smoley, 855 F. Supp. 1123, 1139 (E.D. Cal.  
14 1994) (comparability requirement "creates an equality principle"  
15 for all medically needy individuals); Schott v. Olszewski, 401 F.3d  
16 682, 688-89 (6th Cir. 2005); White v. Beal, 555 F.2d 1146, 1151-52  
17 (3d Cir. 1977). The state may "place appropriate limits on a  
18 service based on such criteria as medical necessity or on  
19 utilization control procedures." 42 C.F.R. § 440.230(c)(2).  
20 However, the state may not "arbitrarily deny or reduce the amount,  
21 duration, or scope of a required service . . . to an otherwise  
22 eligible recipient solely because of the diagnosis, type of  
23 illness, or condition." 42 C.F.R. § 440.230(c)(1).

24       The use of numerical ranks and FI Scores to determine  
25 eligibility for IHSS services likely violates the comparability  
26 requirement because neither reasonably measures the individual need  
27 of a disabled or elderly person for a particular service.

28       Numerical ranks are particularly inaccurate measures of the

1 needs of individuals with mental impairments, such as elders with  
2 Alzheimer's disease. Individuals with cognitive and psychiatric  
3 disabilities frequently require verbal rather than physical  
4 assistance. Therefore, many of these individuals receive numerical  
5 ranks of two rather than three or four. Numerical ranks of two for  
6 recipients with mental disabilities reflect the nature of the  
7 assistance needed, not the severity of the need. Disabled and  
8 elderly individuals with numerical ranks of two have no less need  
9 for verbal assistance than individuals with severe physical  
10 impairments have for physical assistance. For example, elders may  
11 need reminders to eat on a regular basis, take medication or avoid  
12 eating foods contraindicated with certain medications. As one IHSS  
13 Program manager explains:

Often all that someone with a cognitive or psychiatric disability needs in order to maintain a safe and independent living situation is someone who can come by every morning to encourage or remind them to get out of bed, bathe, get dressed, take medication, and have breakfast. . . . [W]ith no IHSS provider visiting regularly . . . [a] person's environment and ability to live safely in the community can fall apart in a matter of days, potentially leading to an exacerbated medical condition, hospitalization, institutionalization, homelessness and/or death.

Nicco Decl. ¶ 23.

A 1996 Study by the Institute for Social Research at California State University Sacramento to assess the FI Score as a predictor of IHSS hours noted that "whether provider assistance is verbal (rank 2) or physical (3) their presence during task performance is necessary and therefore the practical distinction between the two ranks is elusive." Kline Decl., Exh. D at 14.<sup>8</sup> As

<sup>8</sup>Each side has challenged the admissibility of the evidence  
(continued...)

1 noted above, all ranks, two through five, reflect a social worker's  
2 determination that IHSS recipients are "unable to perform the  
3 services themselves" and "cannot safely remain in their homes or  
4 abodes of their own choosing unless these services are provided."  
5 Welf. & Inst. Code § 12300(a).

6 Similarly, the Functional Index Score is not an accurate  
7 measure of need. It does not weigh the critical nature of the  
8 services recipients need and it systematically disadvantages  
9 certain groups of recipients. If a person with a particular type  
10 of disability does not need assistance with most activities, but  
11 critically needs substantial assistance with a few, he or she will  
12 likely receive a low FI Score, and will be deprived of all IHSS  
13 services.

14 For instance, recipients with seizure disorders generally have  
15 an FI Score below 2.0 because they only need assistance with  
16 bathing and cooking; however, it would be dangerous for these  
17 individuals to perform these activities themselves. Blind  
18 recipients also generally have FI Scores below 2.0, but they  
19 critically need assistance traveling to medical appointments.  
20

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21 <sup>8</sup>(...continued)  
22 submitted by the other side. However, on a motion for a  
23 preliminary injunction, the Court may consider inadmissible  
24 evidence, giving such evidence appropriate weight depending on the  
25 competence, personal knowledge, and credibility of the declarants.  
26 11A Charles A. Wright, Arthur K. Miller & Mary K. Kane, Federal  
27 Practice and Procedure § 2949 at 216-217 (2d ed. 1995); see also  
28 Flynt Distrib. Co. v. Harvey, 734 F.2d 1389, 1394 (9th Cir. 1984)  
("The urgency of obtaining a preliminary injunction necessitates a  
prompt determination and makes it difficult to obtain affidavits  
from persons who would be competent to testify at trial. The trial  
court may give even inadmissible evidence some weight, when to do  
so serves the purpose of preventing irreparable harm.") Therefore,  
the Court will exercise its discretion to consider the proffered  
evidence as appropriate.

1       Nor does the length of time a task normally takes necessarily  
2 equate with the importance of the task to an individual's health  
3 and safety. But an elderly person who needs help with tasks which  
4 on average are less time-consuming, such as mobility inside the  
5 home, transfer from sitting to standing or respiration, is more  
6 likely to receive a lower FI Score and lose all her services, than  
7 is one who needs help with the kinds of tasks that tend to take  
8 more time, such as meal preparation.

9       In sum, the FI Scoring system favors elderly and disabled  
10 people with many different needs, especially needs for help with  
11 tasks that are particularly time-intensive, over those with fewer  
12 different needs, and needs for help with tasks that are less time-  
13 intensive, even though the unmet needs of some of the latter  
14 recipients may be equally or more life-threatening than those of  
15 the former. The FI Score simply does not measure the severity of  
16 need.

17       The FI Score is particularly inaccurate as a measure of the  
18 needs of children and adolescents, whose services will be  
19 terminated at disproportionately high rates. Collins Decl. ¶ 7  
20 (thirty-six percent of children in San Luis Obispo County will be  
21 terminated compared to twenty-five percent of adults); Nicco Decl.  
22 ¶¶ 8-9 (twenty-three percent of children in San Francisco County  
23 will be terminated compared to eight percent of adults).

24       Because children, with or without disabilities, are not  
25 generally expected to perform such tasks as meal preparation and  
26 housecleaning, children with disabilities are automatically ranked  
27 at one on such tasks. This rank reflects, not the severity of  
28 their disabilities, but only the expectations of their age group.

1 To illustrate, a child or adolescent with a disability may have  
2 high numerical ranks in other tasks because of serious unmet needs  
3 such as mobility inside the home, transfer from one position to  
4 another, bathing, dressing, or toileting and menstruation.  
5 Nonetheless, his or her composite FI Score will be  
6 disproportionately lower than that of an adult with the same  
7 disability because the adult will likely have more tasks rated  
8 above a one. Children's and adolescents' critical needs, though  
9 fewer in number, will not be met, merely because they do not have  
10 as many unmet needs as adults with the same level of disability.

11 FI Scores, like the numerical ranks, are also particularly  
12 inaccurate measures for individuals with mental impairments. As  
13 noted above, FI Scores do not count the numerical ranks assigned by  
14 social workers for memory, judgment and orientation. Therefore,  
15 mentally disabled individuals will generally have lower FI Scores  
16 than those with physical disabilities. Individuals with mental  
17 disabilities may need only a few critical services, such as  
18 medication management and assistance with domestic and related  
19 tasks. But, because they do not need help with a larger number of  
20 personal care functions such as bowel/bladder, ambulation or  
21 respiration, their FI Scores will generally be below 2.0. Nicco  
22 Decl. ¶ 26; Syripiatko Decl. ¶ 6; Guerra Decl. ¶ 12; Baran Decl.  
23 ¶ 14; Oster Decl. ¶ 11. Nevertheless, individuals with mental  
24 impairments are no less in need of IHSS services than those with  
25 physical impairments.

26 Jenkins, a recent opinion from the Washington State Supreme  
27 Court, is instructive. In that case, the State had previously  
28 determined the number of hours of home health care services needed

1 by recipients, based on assessment of their ability to perform  
2 daily living activities. The State then adopted a "shared living  
3 rule" which reduced the level of household services to recipients  
4 who lived with someone else. The reduction was not based on an  
5 individual's needs for service, that is, it did not consider  
6 whether a recipient lived with someone who actually would help.  
7 The court held that the State violated the comparability  
8 requirement because it "reduce[d] a recipient's benefits based on a  
9 consideration other than the recipient's actual need." Jenkins,  
10 157 P.3d at 390.

11 Here, IHSS recipients have been assessed in an individualized  
12 process to determine the services they need to remain safely in  
13 their homes. With the passage of ABX4 4, the State has  
14 mechanically applied the numerical ranks and FI Score to a use for  
15 which they were not designed. The Score is not a meaningful  
16 measure of an individual's degree of need for services. Because  
17 need is the only basis upon which distinctions between recipients  
18 can be made without violating the comparability requirement,  
19 Plaintiffs have made a strong showing of likelihood of success on  
20 the merits that ABX4 4 violates the comparability requirement of  
21 the Medicaid Act.

22 2. Reasonable Standards Requirement

23 The Medicaid Act requires that all participating states use  
24 "reasonable standards (which shall be comparable for all  
25 groups) . . . for determining eligibility for and the extent of  
26 medical assistance under the plan which . . . are consistent with  
27 the objectives" of the program. 42 U.S.C. § 1396a(a)(17). The  
28 primary objectives of the Medicaid program are to provide medical

1 assistance to individuals whose income and resources are  
2 insufficient to meet the costs of necessary medical services and to  
3 furnish "rehabilitation and other services to help such . . .  
4 individuals attain and retain capability for independence or self  
5 care." 42 U.S.C. § 1396-1.

6 For the reasons discussed above, numerical ranks and FI Scores  
7 were not designed as a measure of eligibility or need for IHSS  
8 services and cannot reasonably be used for this purpose. In a  
9 manual produced by CDSS to help train social workers across the  
10 state about IHSS, the agency described the FI Score in response to  
11 the question, "How does the state compute the Functional Index," as  
12 follows: "that score has been tested and is not meaningful, so it  
13 is a moot point." Kline Decl., Ex. E at 8. A numerical rank of  
14 two or above for any particular task indicates that the recipient  
15 cannot live safely in his or her home without assistance for that  
16 task; however, under ABX4 4, domestic and related services will be  
17 terminated for all recipients with numerical ranks below four.

18 Plaintiffs have shown a likelihood of success on the merits of  
19 their claim that the law employs an unreasonable standard to  
20 determine the extent of medical assistance, in violation of  
21 § 1396a(a)(17).

22 Defendants also argue that Plaintiffs' claims under the  
23 reasonable standards requirement must fail because these provisions  
24 are not privately enforceable using 42 U.S.C. § 1983. Defendants  
25 rely on Watson v. Weeks, 436 F.3d 1152 (9th Cir. 2006). In that  
26 case, the Ninth Circuit held that Congress did not intend the  
27 reasonable standards requirement of Section 1396a(a)(17) to create  
28 a private right of action for individuals and organizations under

1 § 1983. However, Watson does not bar a request for injunctive  
2 relief under the Supremacy Clause for violations of the Medicaid  
3 Act. Independent Living Ctr. S. Cal. v. Shewry, 543 F.3d 1050,  
4 1056-57 (9th Cir. 2009), cert. denied, 129 S. Ct. 2828 (2009). In  
5 Independent Living, the Ninth Circuit noted, "The Supreme Court has  
6 repeatedly entertained claims for injunctive relief based on  
7 federal preemption, without requiring that the standards for  
8 bringing suit under § 1983 be met . . . ." Id. at 1055. The court  
9 continued that "a plaintiff seeking injunctive relief under the  
10 Supremacy Clause on the basis of federal preemption need not assert  
11 a federally created 'right,' in the sense that term has been  
12 recently used in suits brought under § 1983." Id. at 1058.  
13 Although Independent Living involved a different provision of the  
14 Medicaid Act, 42 U.S.C. § 1396a(a)(30)(A), nothing about the facts  
15 or the court's analysis in that case indicates that its holding  
16 would not apply to the statute at issue in the present case. See  
17 Lankford v. Sherman, 451 F.3d 496, 509-13 (8th Cir. 2006).  
18 Although Section 1396a(a)(17) is not enforceable under § 1983,  
19 Plaintiffs' claims for injunctive relief may be brought under the  
20 Supremacy Clause.

21       3. Sufficiency Requirement

22       The regulations implementing the Medicaid Act contain a  
23 "sufficiency" requirement, which mandates, "Each service must be  
24 sufficient in amount, duration, and scope to reasonably achieve its  
25 purpose." 42 C.F.R. § 440.230(b). When a state commits to provide  
26 a Medicaid service, the sufficiency requirement ensures that it  
27 adequately fulfills that obligation.

28       Defendants argue that ABX4 4 satisfies the sufficiency

1 requirement because the law "will ensure that individuals with a  
2 moderate to high level of need will continue to receive all  
3 necessary services." Opposition at 22. However, Defendants fail  
4 to explain how the purposes of the program -- to enable disabled  
5 and elderly people to remain in their homes safely -- will still be  
6 fulfilled if domestic and related services for 97,000 needy  
7 recipients are eliminated.

8 A 2009 report by the UCLA Center for Health Policy Research  
9 assessing the cuts to IHSS found that "domestic services are in  
10 some respects the 'glue' that permits older people to stay in their  
11 homes. Shopping and meal preparation are especially essential,  
12 since they influence how much and how well older people eat."  
13 Benjamin Decl., Ex. B at 13. "Weight loss in elders is often the  
14 reason that they end up being placed into nursing homes. These  
15 domestic and related services are vital." Id. at ¶ 30.

16 The services currently provided through IHSS have already been  
17 determined by social workers to be "necessary" to permit elderly  
18 and disabled individuals to remain safely in their homes. MPP  
19 § 30-761.1. Thus, the elimination of these services will likely  
20 leave affected individuals without a level of service sufficient to  
21 achieve the purpose of the program. Accordingly, the Court  
22 concludes that Plaintiffs are likely to succeed on their  
23 sufficiency claim.<sup>9</sup>

24 \_\_\_\_\_  
25 <sup>9</sup>Defendants assert that Plaintiffs' "sufficiency" claim under  
26 42 C.F.R. § 440.230(b) fails because a federal regulation, by  
itself, does not create a privately enforceable right. See  
27 Alexander v. Sandoval, 532 U.S. 275, 286-87, 291 (2001). However,  
federal regulations may carry preemptive force, see, e.g., Geier v.  
American Honda Motor Co., 529 U.S. 861, 884-86 (2000), and, as  
28 (continued...)

## 1           B. Americans with Disabilities Act Claim

2           The Americans with Disabilities Act (ADA) and the  
3 Rehabilitation Act prohibit discrimination based on disability. 42  
4 U.S.C. § 12132; 29 U.S.C. § 794(a). Unnecessary isolation is a  
5 form of discrimination against people with disabilities. As the  
6 Supreme Court has explained, “[u]njustified isolation of the  
7 disabled” amounts to discrimination because institutional placement  
8 “perpetuates unwarranted assumptions that persons so isolated are  
9 incapable or unworthy of participating in community life” and  
10 “severely diminishes everyday life activities of individuals,  
11 including family relations, social contacts, work options, economic  
12 independence, educational advancement, and cultural enrichment.”  
13 Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 597, 60-61 (1999).

14           Thus, both the ADA and the Rehabilitation Act contain an  
15 “integration mandate” which “serves one of the principal purposes  
16 of Title II of the ADA: ending the isolation and segregation of  
17 disabled persons.” Arc of Washington State v. Braddock, 427 F.3d  
18 615, 618 (9th Cir. 2005). States are required to provide care in  
19 integrated environments for as many disabled persons as is  
20 reasonably feasible, so long as such an environment is appropriate  
21 to their health needs. Specifically, the ADA regulations provide:  
22 “A public entity shall administer services, programs, and  
23 activities in the most integrated setting appropriate to the needs  
24 of qualified persons with disabilities.” 28 C.F.R. § 35.130(d).

25           “The ‘most integrated setting’ is defined as ‘a setting that

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27           <sup>9</sup>(...continued)  
28 such, they may provide a cause of action for injunctive relief  
under the Supremacy Clause.

1 enables individuals with disabilities to interact with non-disabled  
2 persons to the fullest extent possible.'" Brantley, 2009 WL  
3 2941519, at \*6 (citing 28 C.F.R. pt. 35 app. A; Olmstead, 527 U.S.  
4 at 592).

5 Plaintiffs allege that ABX4 4 violates the "integration  
6 mandate" of the ADA and the Rehabilitation Act by placing people in  
7 serious risk of being forced to move out of their homes to the less  
8 integrated setting of institutions. Although Olmstead addressed  
9 ongoing institutionalization, plaintiffs who currently reside in  
10 community settings may assert ADA integration claims to challenge  
11 state actions that give rise to a risk of unnecessary  
12 institutionalization. See Fisher v. Oklahoma Health Care Auth.,  
13 335 F.3d 1175, 1181-82 (10th Cir. 2003) (imposition of cap on  
14 prescription medications placed participants in community-based  
15 program at high risk for premature entry into nursing homes in  
16 violation of ADA); Ball v. Rogers, 2009 WL 1395423, at \*5 (D.  
17 Ariz.) (failure to provide them with needed services "threatened  
18 Plaintiffs with institutionalization, prevented them from leaving  
19 institutions, and in some instances forced them into institutions  
20 in order to receive their necessary care" in violation of the ADA  
21 and Rehabilitation Act); Mental Disability Law Clinic v. Hogan,  
22 2008 WL 4104460, at \*15 (E.D.N.Y.) ("even the risk of unjustified  
23 segregation may be sufficient under Olmstead").

24 Plaintiffs have submitted substantial evidence from experts,  
25 county officials, caregivers and individual recipients showing that  
26 class members face a severe risk of institutionalization as a  
27 result of losing the services that ABX4 4 would eliminate. For  
28 instance, individuals with mental disabilities who lose IHSS

1 assistance to remind them to take medication, attend medical  
2 appointments and perform tasks essential to their continued health  
3 are at a severely increased risk for institutionalization. Elderly  
4 and disabled individuals with unmet in-home care needs will likely  
5 suffer falls which will lead to hospitalization and subsequent  
6 institutionalization. Elderly individuals who lose meal  
7 preparation services will decline in health and risk being placed  
8 in a nursing home.

9 Defendants claim that Plaintiffs are not at risk of  
10 institutionalization because some may have family members who may  
11 be able to take over the care once provided by IHSS and some might  
12 find care through some other community-based service. However,  
13 Defendants bear the ultimate responsibility for ensuring the  
14 State's compliance with federal disability law. "Thus, to the  
15 extent that Defendants are claiming that alternative services  
16 satisfy their obligations under the integration mandate, Defendants  
17 certainly bear the burden of ensuring more than a 'theoretical'  
18 availability of such services." Brantley, 2009 WL 2941519, at \*10.  
19 Moreover, the record demonstrates that alternative services are not  
20 available for a large portion of the class members who face the  
21 risk of institutionalization. Accordingly, the Court concludes  
22 that Plaintiffs have shown a likelihood of success on the merits of  
23 their claim that Defendants violated the integration mandate.

24 C. Due Process Claim

25 Due process requires that the state must provide "notice  
26 reasonably calculated, under all the circumstances, to apprise  
27 interested parties of the pendency of the action and afford them an  
28 opportunity to present their objections." Mullane v. Central

1     Hannover Bank & Trust Co., 339 U.S. 306, 314 (1950). IHSS  
2 recipients must receive "timely and adequate notice detailing the  
3 reasons for termination and an effective opportunity to defend"  
4 themselves. Goldberg v. Kelly, 397 U.S. 254, 268-69 (1970). To  
5 comport with due process, notice must be "tailored to the  
6 capacities and circumstances" of the recipients who must decide  
7 whether to request a hearing. Id. at 268. "The government must  
8 consider unique information about an intended recipient regardless  
9 of whether a statutory scheme is reasonably calculated to provide  
10 notice in the ordinary case." Jones v. Flowers, 547 U.S. 220, 221  
11 (2006).

12       Here, the notices Defendants plan to mail to IHSS recipients  
13 likely do not comport with due process. Many class members,  
14 because of their disabilities or inability to read English or both,  
15 will be unable to understand and act upon the notice within ten  
16 days of receipt so that they can request a fair hearing and  
17 continue to receive IHSS services. For instance, fifteen percent  
18 of IHSS recipients speak only Spanish. There is one line at the  
19 bottom of the notices in Spanish that tells recipients to contact  
20 "the social worker in your county" if they do not understand the  
21 information. This phrase is misleading and confusing. The notice  
22 says that the county should provide free translation services but  
23 it does not tell recipients how to get this service nor has the  
24 State made a showing that each county actually will provide this  
25 service. Further, the notice does not warn Spanish-speaking  
26 recipients that this is an important notice regarding termination  
27 or reduction of benefits. Thirty-four percent of recipients are  
28 monolingual in a language other than English or Spanish. Thus,

1 this notice will be entirely meaningless to them. It is not  
2 reasonable to expect these individuals to obtain translation of the  
3 notice in sufficient time to act upon it within ten days, to  
4 receive aid pending termination.

5       The notice is also difficult to read. The print is small,  
6 single spaced and in all capital letters. It contains unexplained  
7 acronyms and the description of numerical ranks and FI Scores is  
8 virtually unintelligible. The elderly and disabled individuals  
9 reading these notices will have a difficult time understanding  
10 them, let alone taking the affirmative action required. Many IHSS  
11 recipients cannot easily leave their homes due to their  
12 disabilities; the notice does not inform them of their right to  
13 have a hearing at home to dispute the service cuts.

14       CDSS has recognized that, before this notice, IHSS "recipients  
15 have not previously been informed of their FI Ranks or FI  
16 Scores. . . . the NOA [Notice of Action] implementing this change  
17 in law will be the first time recipients have been informed of  
18 their FI Ranks or FI Scores." All County Letter No. 09-56, sent on  
19 October 1, 2009. The terse notice and one page description of how  
20 the FI Score is calculated do little to inform recipients of the  
21 reasons for termination or how they might be able to rebut the  
22 decision to terminate their IHSS services. Therefore, the Court  
23 concludes that Plaintiffs have shown a likelihood of success on the  
24 merits of their claim that the notice violates due process.<sup>10</sup>

25 \_\_\_\_\_  
26       <sup>10</sup>Because the Court concludes that a preliminary injunction is  
27 warranted based on Plaintiffs' likelihood of success on their  
Medicaid Act, ADA integration mandate and due process claims, the  
Court need not determine the likelihood of Plaintiffs' success on  
28 (continued...)

1       III. Irreparable Harm, Balance of Hardships and the Public Interest  
2                  Numerous federal courts have recognized that the reduction or  
3                  elimination of public medical benefits irreparably harms the  
4                  participants in the programs being cut. See Beltran v. Myers, 677  
5                  F.2d 1317, 1322 (9th Cir. 1982) (holding that possibility that  
6                  plaintiffs would be denied Medicaid benefits sufficient to  
7                  establish irreparable harm); Newton-Nations v. Rogers, 316 F. Supp.  
8                  2d 883, 888 (D. Ariz. 2004) (citing Beltran and finding irreparable  
9                  harm shown where Medicaid recipients could be denied medical care  
10                 as a result of their inability to pay increased co-payment to  
11                 medical service providers); Edmonds v. Levine, 417 F. Supp. 2d  
12                 1323, 1342 (S.D. Fla. 2006) (finding that state Medicaid agency's  
13                 denial of coverage for off-label use of prescription pain  
14                 medication would irreparably harm plaintiffs).

15                  In addition, Plaintiffs have presented ample evidence to  
16                 support their claim that they will suffer immediate and irreparable  
17                 harm unless the Court issues a preliminary injunction. Counselors  
18                 who work with IHSS recipients predict a "humanitarian disaster" and  
19                 premature deaths. Baran Decl. ¶ 18; Goldberg Decl. ¶¶ 6-7. Some  
20                 individuals who lose their IHSS may neglect to take vital  
21                 medications or take them improperly. Others will be unable to  
22                 leave their house to obtain food, medication and other necessities.  
23                 Without an IHSS caregiver to transport recipients to doctor's  
24                 appointments, many will go without essential care. Some recipients  
25                 will try to clean their home or cook food and injure themselves as  
26                 a result. Other recipients, because of mental illness or lack of

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27                  <sup>10</sup>(...continued)  
28                 their other claims under the ADA.

1 appetite, need assistance in order to eat at all.

Entire families will be destabilized when a child or family member is deprived of IHSS because relatives serving as caregivers will be forced to seek other jobs without a way to care for their loved ones. See e.g., Hathaway Decl. ¶ 5; Crockett Decl. ¶¶ 19-20; Kaljian Decl. ¶ 18. Even a temporary interruption in services may “result in damaging setbacks” for the affected individual. Baran Decl. ¶ 20. The Executive Director of the IHSS Consortium in San Francisco stated:

10 Each one of the IHSS recipients affected by the cuts  
11 represents a person with a disability who has been stabilized  
12 at home, often through a painstaking process that takes months  
13 or even years, to find the right attendant, the right home or  
apartment, the right combination of services. All of this  
will be lost. And even if the cuts are restored later, it  
will be virtually impossible to rebuild the safe living  
situations people have now.

Id. There is also a serious risk that individuals with mental or cognitive disabilities will become homeless if they lose IHSS services. Once homeless, mentally ill individuals decline rapidly and could end up anywhere from a psychiatric hospital to jail.

As noted above, if ABX4 4 is implemented, class members will face a severe risk of unnecessary institutionalization.<sup>11</sup> Institutionalizing individuals who can comfortably survive in their

22       <sup>11</sup>State Defendants argue that Plaintiffs have not shown that  
23 any "named plaintiffs" are likely to suffer imminent, irreparable  
24 harm. Opposition at 28. However, Defendants do not point to any  
25 Ninth Circuit law that imposes the requirement that the Court  
26 should consider only the risk of institutionalization faced by the  
27 named Plaintiffs, and not by other class member declarants.  
28 Moreover, because Defendants have conceded that the instant  
injunction may apply to the entire class before such a class is  
certified, the Court can look beyond the named Plaintiffs when  
analyzing this aspect of the preliminary injunction motion.  
Further, even if Defendants' argument is correct, the named  
Plaintiffs in this case are likely to face the risk of unnecessary  
institutionalization.

1 home with the help of IHSS caregivers will "cause Plaintiffs to  
2 suffer injury to their mental and physical health, including a  
3 shortened life, and even death for some Plaintiffs." Crabtree v.  
4 Goetz, 2008 WL 5330506, at \*30 (M.D. Tenn.).

5 The balance of hardships also weighs in Plaintiffs' favor. If  
6 the preliminary injunction does not issue, the State Defendants'  
7 sole injury will be the financial costs associated with continuing  
8 to provide services under the status quo. The Court weighs  
9 California's budget crisis in the balance. However, "[a] budget  
10 crisis does not excuse ongoing violations of federal law,  
11 particularly when there are no adequate remedies available other  
12 than an injunction." Independent Living Ctr., 572 F.3d at 659. If  
13 the State is of the view that some people are receiving IHSS  
14 services for their convenience or improved quality of life rather  
15 than need, individualized measures could be adopted to address this  
16 circumstance. Further, the Court notes that there is persuasive  
17 evidence that the IHSS cuts would actually cost the State tens of  
18 millions of additional dollars because in-home care is considerably  
19 less expensive than institutional care and IHSS caregivers reduce  
20 the need for expensive emergency room visits and hospitalization.  
21 Accordingly, the financial loss the State may suffer if ABX4 4 is  
22 not implemented does not outweigh the hardship Plaintiffs would  
23 suffer absent an injunction.

24 Lastly, the public interest weighs heavily in favor of  
25 granting relief. "It would be tragic, not only from the standpoint  
26 of the individuals involved but also from the standpoint of  
27 society, were poor, elderly, disabled people to be wrongfully  
28 deprived of essential benefits for any period of time." Lopez v.

<sup>1</sup> Heckler, 713 F.2d 1432, 1437 (9th Cir. 1983).

2 || III. Bond

Federal Rule of Civil Procedure 65(c) "invests the district court 'with discretion as to the amount of security required, if any.'" Jorgensen v. Cassiday, 320 F.3d 906, 919 (9th Cir. 2003) (emphasis in original; quoting Barahona-Gomez v. Reno, 167 F.3d 1228, 1237 (9th Cir. 1999)). A district court has the discretion to dispense with the security requirement where giving security would effectively deny access to judicial review. See Save Our Sonoran, Inc. v. Flowers, 408 F.3d 1113, 1126 (9th Cir. 2005) (citation omitted). Similarly, a district court may waive the bond requirement where the plaintiffs are indigent. See Walker v. Pierce, 665 F. Supp. 831, 844 (N.D. Cal. 1987). The Court waives the bond requirement for Plaintiffs because they are indigent and to ensure their ability to access the courts on behalf of themselves and other class members.

## CONCLUSION

18 For the foregoing reasons, the Court grants Plaintiffs' motion  
19 for a preliminary injunction (Docket No. 16). Defendants and their  
20 successors, agents, officers, servants, employees, attorneys and  
21 representatives and all persons acting in concert or participating  
22 with them are enjoined from implementing the provisions of ABX4 4  
23 that amended Sections 12309(e) and 12309.2 of the California  
24 Welfare and Institutions Code to terminate from eligibility for  
25 IHSS services those recipients with Functional Index Scores of less  
26 than 2.0 and to eliminate domestic and related services for  
27 recipients with functional ranks of less than 4 for those services.

28 The Court further orders that, to the extent that Defendants

1 have already taken actions to eliminate eligibility for IHSS  
2 services for individuals with an FI Score under 2, or to eliminate  
3 eligibility for domestic and related services for individuals with  
4 functional ranks under 4, Defendants shall take all steps and  
5 commit all resources necessary to ensure that no otherwise eligible  
6 individual is denied eligibility for, or terminated from, IHSS,  
7 solely on the basis of an FI Score under 2.0, and that no otherwise  
8 eligible individual is denied eligibility for, or terminated from,  
9 receipt of domestic and related IHSS services, solely on the basis  
10 of a functional rank under 4. Defendants shall further ensure that  
11 there is no delay in paying IHSS providers for services rendered to  
12 individuals whom Defendants had planned to terminate or reduce IHSS  
13 eligibility on the basis of an FI score under 2.0 or a functional  
14 rank under 4. Defendants shall determine the method of  
15 implementing the preliminary injunction that will be the least  
16 expensive in the aggregate to the county and state taxpayers.  
17 Defendants may require the counties to re-enter manually the  
18 information about individual recipients whose IHSS services were  
19 scheduled to be terminated or reduced because their FI Scores were  
20 below 2.0 or their functional ranks for a particular domestic or  
21 related service were below 4 only if that is less expensive than  
22 doing it themselves. The State must reimburse the counties for  
23 their expenses. The State may instead restore the system back-up  
24 and re-enter the changes made in the interim.

25 To ensure that all relevant parties are aware of the Court's  
26 injunction, Defendants shall further rescind any directions or  
27 notices issued to any person or entity for the termination or  
28 reduction of IHSS benefits on the basis of an FI Score under 2 or

1 functional ranks under 4; and shall notify all persons and entities  
2 that have received such directions or notices that such IHSS  
3 benefits will not be terminated or reduced. Defendants shall mail  
4 a notice to all IHSS recipients informing them, in language agreed  
5 upon by the parties, that the previously announced terminations or  
6 reductions in IHSS service will not go into effect. Defendants  
7 must mail this notice by Tuesday, October 27.

8 Defendants shall post a copy of this preliminary injunction  
9 with an explanation of its effect on IHSS services conspicuously on  
10 its website by the close of business on Monday, October 26, 2009.  
11 Defendants shall serve and file a declaration of compliance by  
12 Thursday, October 29, 2009.

13 The Court denies Plaintiffs' motion for class certification  
14 without prejudice to refiling (Docket No. 20) and denies  
15 Defendants' motion for reconsideration of the temporary restraining  
16 order (Docket No. 169). The Court denies Defendants' motion, made  
17 orally at the hearing, for a stay pending appeal.

18 IT IS SO ORDERED.

19 Dated: 10/23/09

*Claudia Wilken*

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CLAUDIA WILKEN  
United States District Judge

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